

**NFL Parties' Opposition to Appeal of
Claim Determination Filed by Representative Claimant Kendra Moyes**

On September 25, 2018, Representative Claimant Kendra Moyes submitted a Claim Form on behalf of her deceased father, Ken Stabler, for a July 8, 2015 Qualifying Diagnosis of Alzheimer's Disease ("Alzheimer's") provided by neuropsychologist Todd Solomon, Ph.D. and neuropathologist Dr. Ann C. McKee. (See Claim Form at 3, Doc. No. 186345.) Unfortunately, because Mr. Stabler was never diagnosed with Alzheimer's while living, the Settlement Agreement does not entitle him to a Monetary Award, and his claim was therefore properly denied.

Initially, Ms. Moyes submitted a Diagnosing Physician Certification Form signed by Dr. McKee for a diagnosis of Death with CTE on November 10, 2015. (See Diagnosing Physician Certification at 6, Doc. No. 184905.) Ms. Moyes then wrote to the Claims Administrator to clarify that she was not seeking a Monetary Award for Death with CTE, but instead was seeking compensation for an Alzheimer's diagnosis based on a *post-mortem* pathological examination of Mr. Stabler's brain and statements by family members about his impairment when living. (See Notice of Filing at 1, 6, Doc. No. 186527.) Regrettably, Ms. Moyes acknowledged that she lacked any records or documentation of a physician evaluating Mr. Stabler for Alzheimer's while living, as no such examination occurred. (See *id.* at 2, 6.)

On September 28, 2018, the Claims Administrator denied Ms. Moyes' claim based on a determination that: (1) Mr. Stabler was ineligible to receive a Qualifying Diagnosis of Death with CTE because he died after April 22, 2015; and (2) Ms. Moyes did not submit a Diagnosing Physician Certification Form for any other Qualifying Diagnosis, such as Alzheimer's, that was made while Mr. Stabler was living. Ms. Moyes appealed that denial by arguing that her claim should be approved for Alzheimer's because Dr. McKee determined that Mr. Stabler's brain showed pathological evidence of Alzheimer's and Mr. Stabler's life partner, Kim Bush, submitted an affidavit stating that Mr. Stabler developed memory deficits in 2014-2015. (See Statement of Appeal ("Appeal"), Doc. No. 188958.)

The NFL Parties respectfully oppose Ms. Moyes' appeal because the claim fails to comply with the Settlement Agreement's Injury Definition for a Qualifying Diagnosis of Alzheimer's because Mr. Stabler was never diagnosed with Alzheimer's by an appropriately credentialed physician while living. On appeal, Ms. Moyes argues that her claim should be exempted from the Settlement Agreement's requirements, but the Settlement Agreement does not permit such an exemption. For these reasons, and those set forth herein, Ms. Moyes' appeal should be denied.

**I. Ms. Moyes' Claim Package Did Not Support a Qualifying Diagnosis
of Alzheimer's**

The Settlement Agreement's Injury Definition for a Qualifying Diagnosis of Alzheimer's for players deceased prior to the Effective Date of the Settlement Agreement, such as Mr. Stabler, requires "a diagnosis of Major Neurocognitive Disorder due to probable Alzheimer's Disease . . . or a diagnosis of Alzheimer's Disease, ***made while the Retired NFL Football Player was living***" by a qualified physician. (Settlement Agreement, Ex. A-1 at 4 (emphasis added).) Settlement Program FAQ 89 confirms this requirement, stating that, for a Qualifying Diagnosis of Alzheimer's, "the Player had to have been diagnosed *while he was living* by a physician with the appropriate qualifications." Here, Ms. Moyes acknowledges Mr. Stabler was not diagnosed with Alzheimer's while living.

Instead, Ms. Moyes petitions for Mr. Stabler to be excused from that Settlement Agreement requirement because Dr. McKee’s autopsy of Mr. Stabler’s brain found “Changes of Alzheimer’s disease,” and because Mr. Stabler’s life partner, Ms. Bush, described memory problems that Mr. Stabler developed in the last few years of his life. (*See* Appeal at 2-4; *see also* McKee Report at 2, Doc. No. 186531; Bush Affidavit at 2, Doc. No. 186530.) Ms. Moyes also argues that Mr. Stabler was too focused on fighting cancer to see a neurologist prior to his death—notwithstanding the fact that he underwent extensive dental work in 2015 and was planning to have knee replacement surgery. (Appeal at 5.) Unfortunately, there is nothing in the Settlement Agreement that provides an exemption to the fundamental requirement of a diagnosis while the player was living. None of the provisions on which Ms. Moyes seeks to rely—namely, Sections 6.4(b) and 6.6(b) of the Settlement Agreement, and Settlement Program FAQ 116—provide for such relief.

Specifically, Section 6.4(b) of the Settlement Agreement states that “review of whether a Qualifying Diagnosis is based on principles generally consistent with the diagnostic criteria set forth in Exhibit 1 (Injury Definitions) does not require identical diagnostic criteria, including without limitation, the same testing protocols or documentation requirements.” That provision, however, concerns *how* a diagnosis is rendered while the player is living. It does not alter the fundamental principle of the Settlement Agreement’s Injury Definition that a diagnosis of Alzheimer’s must be made *while* the player is living. For this reason, the Claims Administrator properly did not apply Section 6.4(b) to this claim.

Next, Section 6.6(b) of the Settlement Agreement states that “Monetary Awards . . . shall compensate Settlement Class Members only in circumstances where a Retired NFL Football Player manifests actual cognitive impairment.” Ms. Moyes argues that this section supports her appeal because Dr. McKee’s report and Ms. Bush’s affidavit both describe cognitive impairment that Mr. Stabler manifested while alive. (*See* Appeal at 2.) However, Ms. Moyes omits the rest of Section 6.6(b), which states that “[f]or the avoidance of any doubt, the identification of a condition—for example, through a blood test, genetic test, imaging technique, or otherwise—that has not yet resulted in actual cognitive impairment . . . experienced by the Retired NFL Football Player does not qualify as a Qualifying Diagnosis.” In other words, this provision merely confirms that a valid diagnosis requires not only that the player be living at the time—as set forth in the Injury Definition—but also that impairment must actually manifest at the time of the diagnosis. Nothing in Section 6.6(b) supports that a backwards looking, *post-mortem* analysis based on interviews with family members is sufficient to meet the Injury Definition for Alzheimer’s. Nor would such interpretation be proper because it would read a clear term out of the Settlement Agreement without any proper basis.

Finally, Settlement Program FAQ 116 provides, in part, that “[t]he Claims Administrator has discretion to review and decide Settlement Class Members’ requests to excuse the Diagnosing Physician Certification Form and/or medical records reflecting Qualifying Diagnosis requirements and to determine the appropriate date of diagnosis in such circumstances, based on evidence the Claims Administrator deems necessary to evaluate each request” (Settlement Program FAQ 116; *see* Appeal at 3.) Here, the Claims Administrator did not exercise any such purported discretion, and denied Ms. Moyes’ claim.¹ Moreover, FAQ 116 is intended to apply to scenarios

¹ Moreover, to the extent that the FAQ purports to expand the circumstances in which the Claims Administrator may excuse the lack of medical records or a Diagnosing Physician Certification Form beyond those set forth in the Settlement Agreement without the Parties’ consent, the NFL Parties respectfully submit that it would

where documentation may be lacking but there was a diagnosis of the retired player while he was living. (*See id.* (“The Claims Administrator has discretion to review and decide Settlement Class Members’ requests to excuse the Diagnosing Physician Certification Form and/or medical records reflecting Qualifying Diagnosis requirements *and to determine the appropriate date of diagnosis in such circumstances . . .*”) (emphasis added).) Here, as stated above, Mr. Stabler never received such a diagnosis, and therefore FAQ 116 is inapplicable.

Conclusion

For the reasons set forth herein, Ms. Moyes’ appeal should be denied.²

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Respectfully submitted,

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constitute a material change to the heavily negotiated and judicially approved terms of the Settlement Agreement and, thus, would be improper.

² As noted above, the Claims Administrator also correctly determined that Mr. Stabler was not eligible for a Qualifying Diagnosis of Death with CTE based on his date of death. Ms. Moyes has not argued otherwise on appeal, and confirmed that she “does not seek a Monetary Award for a Qualifying Diagnosis of CTE.” (Appeal at 1 n.1.) For this reason, the NFL Parties do not further address this basis for the claim denial.